No. 14770

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE C. FINN, CHARLES C. FINN, INTERNATIONAL AIRPORTS, INC., A CORPORATION, PETER A. BANCROFT AND VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, APPELLEES

AND

VINELAND ELEMENTARY SCHOOL DISTRICT OF KERN COUNTY, CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, GEORGE C. FINN, CHARLES C. FINN, AND INTERNATIONAL AIRPORTS, INC., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

FINAL BRIEF FOR THE UNITED STATES

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We believe that the briefs previously filed by the Government adequately demonstrate that the decision below was erroneous. However, in view of the discussion at the oral argument, we wish to supplement the Government's briefs heretofore filed on two particular matters—i. e., (1) the validity of Form 65

and the restrictions on resale therein contained, and (2) the position that the Finns obtained through improper representations a Civil Aeronautics Administration certificate of registration which they thereafter used as proof that the restrictions had been removed.

I

Examination of all the applicable statutory provisions and regulations, rather than the limited parts thereof considered by the court below, clearly shows the fallacy of the rulings that Form 65 was invalid because inconsistent with the regulations and that the regulation which the court regarded as applicable was invalid because inconsistent with the Surplus Property Act [1]

The error in the Court's rulings stems from failure to consider all the relevant statutory provisions and regulations, and, in consequence, from reliance on certain provisions and regulations which are not in fact controlling.

For example, the Court lays great stress on the provision in Section 13 (a) (1) (A) of the statute that surplus appropriate for school use "may be sold or leased". On the assumption that Regulation 4 (C. F. R., 1946 Supp., Ch. XXIII, Part 8304, pages 5142, et seq.) is the only one implementing Section 13, the Court concludes that it unlawfully exceeds the authority of the statute in providing for any other method of disposition. (See Tr. 128–129; 133–134.) The fallacy of this reasoning stems from the Court's overlooking or ignoring Regulation 14 (C. F. R.,

[1] The Sixth Circuit's decision rests on and adds nothing to the reasoning of the court below. What is said herein is therefore applicable to both decisions. The first two divisions of the Finn's brief also re-assert Judge Mathes' reasoning.

1946 Supp., Ch. XXII, Part 8314, pp. 5227 et seq.) which is the one which primarily implements Section 13. It provides for the sale or lease of surplus to schools at 40 percent discounts. Regulation 4, on the other hand, is a special regulation dealing only with disposition of aeronautical property on a basis which was practically a donation since the "price" placed on airplanes covered only packing and handling charges and was not subject to the 40 percent discount applicable to other sales to schools. See last paragraph of "Instructions" in Vineland's Exhibit E.

Thus the Court imported into its reasoning language which was applicable to the general school disposal program rather than to the program here involved. The significance which the Court attached to a comparison of the wording of Section 13 (a) (1) (A) and Regulation 4 disappears when Regulation 14 is taken into consideration as part of the whole picture.

Another example of fallaciously incomplete scrutiny of the regulations is the Court's statement at Tr. 129 that, as of the date of the transfer to the school, a sale was the only permissible method of transfer. This provision in Section 8304.7 relates only to disposals for use as "transport aircraft" (cf. f. n. 27, p. 38 of Government's opening brief); whereas the transfer here involved was of an airplane falling into an entirely different category—namely, one which had been determined to be "commercially unsaleable" under Sections 8304.1 (b) (2), 8304.5 and 8304.10 (see second paragraph of Vineland's Exhibit E, and paragraph II of "Instructions" in that exhibit). Such airplanes were subject, under Section 13 (a) (2) (b)

of the Surplus Property Act and Regulations 8304.13 and 8304.11, to donation or other disposition to schools in the precise manner outlined in Vineland's Exhibit E and Form 65.

More significant even than either of the foregoing is the Court's failure to construe Section 8304.11 and the disposal program in the present case described in Vineland's Exhibit E in the light of Sections 8304.16, 8301.18, 8301.19, 8314.7, 8314.11 and 8314.12. All these Sections clearly provide that disposal agencies "shall establish procedures" for the disposition of the kinds of property committed to them, and shall file with the Administrator "copies of all their regulations, orders and instructions of general applicability."[2] When these procedures, regulations, orders and instructions are approved by the Administrator they become ~~equal~~ parts of the regulations of equal standing with the general provisions. There is no room therefore for an assertion that they are contrary to regulations simply because they were not set forth in detail in the general provisions. Not only is such flexibility inevitably necessary and therefore proper in the administration of such a vast program; it is clearly authorized by Sections 4, 9, 13 (a), 13 (b) and 15 of the statute.

Against this background, and with attention to all regulations rather than only the part considered be-

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[2] War Assets Administration had dual functions. It was the agency established to supervise all disposition of surplus through "disposal agencies" designated by it for various kinds of property. It designated itself as the disposal agency of property not specifically assigned to certain named agencies, including aircraft. See Section 8301.2 (g) (5).

low, it is entirely clear and easily demonstrable that disposal of the airplane in question pursuant to the program described in Vineland's Exhibit E and Form 65 was authorized by the Administrator and was well within his powers under the regulations and the statute. There was an "Educational Aircraft Disposal Division" within the Administration (see Vineland Exhibit E). Specific testimony as to its official and lawful establishment is not necessary; that may be assumed. The Division determined that certain airplanes were "commercially unsaleable." (See the second paragraph of the Exhibit and paragraph II of the "Instructions.") It was the power and duty of the Division under Section 8304.10 to make that determination. The determination having been made, it was the duty of the Division, under Section 8304.11 (a), to compile a list of the items and to fix prices therefor reflecting the benefit that would accrue to the Government from their use by schools, and to submit the list to the Administrator. The Section provides that if the lists are approved by the Administrator they shall be published "by order hereunder"; and the Division would thereupon be authorized to dispose of the airplanes at such prices. Such an order was made. It was published in 11 F. R. 1471 on January 31, 1946, effective on February 5, 1946, as Order 4. The list which is part of the order includes the very type of airplane involved in this case.[3] Order 4 was

[3] It is listed in Order 4 under Catalog Number 42–2420 as a C–46 Curtiss-Wright Commando at the price of $200. Precisely the same description and price appear in Vineland's Purchase Order of June 25, 1946, Vineland's Exhibit D.

continued "in full force and effect" in the preamble of Regulation 4 of May 21, 1946 (the one here involved) and the list which is part of the disposal program described in Vineland's Exhibit E again includes, under the same catalogue number and price, C–46 planes of the kind involved in the present case. Thus its disposition under Section 8304.11 (a) was specifically authorized.

Section 8304.11 further directs that the disposal agency "shall establish procedures" for the disposal of the listed airplanes to schools. It is clear that the letter, the instructions, the lists, and the accompanying form of purchase order and Form 65 making up Vineland's Exhibit E together constitute such "procedures." They obviously fall within the coverage of Section 8304.16 as "regulations, orders, or instructions of general applicability" to be submitted to the Administrator. In view of the presumption of regularity in the discharge of duties of public officers, and the fact that the documents describing the program and procedures (Vineland's Exhibit E) were mailed to schools throughout the country, it is entirely proper to conclude that it was approved by the Administrator. The discussion and references above show that such action on his part was well within his statutory authority and regulations.

There remains for consideration the error in the reasoning of the court below that Form 65 is invalid. The Court's conclusion rests in substantial degree on the fact that Section 3804.11 (b) requires an agreement of the school that the airplane "will not be flown except for purposes of research or experiment in con-

nection with the science of aeronautics," whereas Form 65 requires an agreement that the airplane "will not be used for any actual flight purposes" (Tr. 132–134). It was suggested below that this allegedly unauthorized and fatal variation was the result of using in Form 65 the wording of an earlier and "superseded" regulation (Tr. 133).

But examination of the "superseded regulation" referred to by the court at Tr. 133 shows that its wording is not the same as that of Form 65. The earlier regulation required an agreement that the airplane "will not be used for *any* flight purpose" (italics supplied). Apart from this error of the court below, consideration of the successive phrasings in the light of the known purposes of the educational airplane disposal program indicates that the variations are not material and that the significance given to them below is unwarranted. It is clear that the justification for transfer of airplanes to schools at nominal prices was to get the benefit of their use in education; and that resale by the schools at higher figures to persons who would use them in commercial flight would have frustrated the statutory objective of avoiding speculation in surplus. (See Section 2 (b) of the statute.) Hence, the initial prohibition against use for *any* flight purpose. The later wording of Section 3804.11 (b) was designed to carry on this basic purpose and at the same time to recognize the propriety of flight use by schools for the limited purpose of "research and experiment in connection with the science of aeronautics"—an educational as distinguished from a commercial use. The words in

Form 65 prohibiting use for "*actual* flight purposes" are readily susceptible to the same construction—i. e. prohibiting commercial use—and presumably were merely regarded as a better way of saying the same thing. The semantic argument of the court below is not forceful enough to justify overthrowing a large disposal program, particularly as it was clearly within the power of the Administrator, under the statutory and regulatory provisions referred to above, to have approved disposal procedures and general instructions or changes therein submitted to him from time to time by his operating officers.

This brings us to consideration of the conclusion of the court below (Tr. 133, 136) and of the Finn's (Brief, pages 11, 12) that there was no restriction on the sale of the airplane after three years.

We see no reason why the restriction against sale within three years means anything more than just what it says, and expresses a desire to carefully supervise the operation of the school within that period, and to be alerted to situations where an airplane no longer needed by the initial recipient, but still useable for educational purposes, could be transferred to another school. Surely it would have been very easy to say straight forwardly that airplanes could be sold for any or every purpose after three years, if such had been the purpose. Obviously, however, that was not the intent or thinking of the Administration. The whole objective of the distribution of the airplanes on what was virtually a donation basis at nominal prices was to get and retain as long as possible the benefit of their use for educational purposes. Schools had to

qualify. They had to certify their need and to state the particular "non-flight" instructional or research or experimental use they had in mind. Actual (i. e., commercial) flight was prohibited. To permit resale for commercial use of airplanes still useable for the very purpose of their transfer flies so plainly in the face of the known objectives of the disposal program as to indicate the unsoundness of a conclusion authorizing such sales on the basis of the wording of the three year clause.

The propriety of continuing the use for educational purposes until the airplane is truly good for nothing but scrap is obviously proper; and the Administrator's approval of the disposal program submitted to him under Sections 3804.16 and 3804.11 is obviously within his powers and wholly lawful. It should be so declared and the contrary decision of the court below should be reversed.

II

The CAA registration which the Finns used as proof of official removal of the restrictions on sale of the airplane in suit to them was obtained by the use of false and misleading documents and improper procedures

George Finn was told in Washington about March 15, 1951, that the restrictions would not be waived (Tr. 361, 738, 743, 760, 761). He knew of the provision in the Civil Aeronautics Act of 1938 (Section 501 (f) of the statute, Act of June 23, 1938, c. 601, 52 Stat. 1006, as amended by 62 Stat. 494) which stated that registration was not proof of title (Tr. 483). Nevertheless he obtained registration improperly and then got possession of the plane from the school on the

representation that the registration established that the restrictions had been removed.

The technique of getting CAA registration of the plane in suit (serial number 3645), was first worked out in connection with the old plane (serial number 96563) referred to in the trial as the "hulk." On April 9, 1951 Finn presented to CAA a bill of sale from the school of the hulk on CAA form 500, dated March 28, 1951 (part of Plaintiffs' Exhibit 12), and a false affidavit of Peter Bancroft dated April 6, 1951 (International Exhibit U–4) to which were appended the "Sales Document" which is International Exhibit T, and the "Release of Custody" which is International Exhibit U–3. The statement in the affidavit that the hulk had been sold to Finn on March 28 was false. It had been sold on October 9, 1950, by the document which is Vineland Exhibit G. It is the plane which the Finns agreed to reconvey to the school under the terms of the agreement of February 28, 1951. See paragraph (1) of part III Vineland Exhibit B. The characterization of the Sales Document as an "invoice"—implying an unrestricted sale to the school—is improper since the hulk had been obtained, as all educational airplanes were obtained, upon the school's execution of Form 65 or its predecessor Form 35.

The purpose and scheme to obtain CAA registration on this kind of documentation is revealed by what occurred at the conference in Washington on April 4, 1941, which was attended by Mr. Howard of CAA. Finn showed photographs of the hulk, and said it was the plane he wanted to register (Tr. 447, 497). There

was discussion of the coverage of the provision in Form 65 which permitted sale as "scrap" (Tr. 495). The hulk shown in the photographs might well have been thought to fall into that category. Against this background it is easy to see how registration was obtained on the documents described above on April 11, 1951.

Having gotten registration of the hulk in this way, registration of the plane in suit was obtained by the presentation to CAA of a comparable set of misleading and false papers. On April 14, 1951, Mr. Bancroft executed an affidavit in the same general form as the previous one (Government's Exhibit 7; also part of International Exhibit A) which was false or misleading in various ways. As in the former instance, a "Sales Receipt" relating to the airplane was attached (see International Exhibit A) and referred to in a manner indicating it to be evidence of an outright sale; whereas Bancroft well knew that he had signed Form 65 as a condition precedent to getting the plane. This deception was compounded by the false statement that all other "records pertaining to" the plane had been destroyed by a fire on March 5, 1951; which statement is proven false by the school's introduction at the trial of its copy of the agreement with the Finns of February 28, 1951 (Vineland Exhibit B). The affidavit next falsely said that title was conveyed to the Finns on February 28, 1951, by the attached bill of sale on CAA form 500. That document was not signed until April 14, 1951, the same date as the affidavit. The use of the CAA form of Bill of Sale was prohibited by Part C–3 of the

CAA "Instructions for Registering an Aircraft" (International Exhibit M). Since the agreement of sale to the Finns of February 28, 1951, was clearly a "conditional sale contract" within the meaning of the instructions and the definition in the Civil Aeronautics Act (Section 1 (17) (18) of the Civil Aeronautics Act) the agreement of February 28, 1951, is what should have been submitted. If it had been submitted the certificate would have stated the interest of the school rather than an unqualified interest of the Finns. See Section 503 (1) (2) of the statute. But, as we have seen, its existence was negated by the false statement that it had been destroyed by fire.

So now we see how the Finns, after establishing with the hulk the pattern of registration on a CAA form of Bill of Sale and a false affidavit of Bancroft, were able to accomplish by the same technique an improper registration of the plane in suit.

Their improper obtaining in this way of CAA registration, and their use of the registration to obtain physical possession of the plane, and thereafter their use of that possession and a false warranty of complete and unencumbered title to effect a $15,000 mortgage of the plane to International, is conduct so shocking as to disentitle the Finns to any defense—let alone an affirmative recovery—at the hands of this court.

The Government briefs heretofore submitted on all other issues, including the legal effect of the restrictions (assuming them not to be invalid as declared by the court below), are reaffirmed.

The judgment below should be reversed.

Respectfully submitted.

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